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BROWN AS ICON

STEVEN L. WINTER†

What becomes a legend most? Some readers may remember the renowned Blackglama advertising campaign in which legendary, but aging pop culture figures such as Sophia Loren, Elizabeth Taylor, Audrey Hepburn, Diana Ross, Lena Horne, even Lillian Hellman appeared in an elegant black mink coat—sometimes with just the hint of bare shoulder or bosom. For those too young to have seen these famous ads, fear not: The company has relaunched the campaign. Only this time, the ads feature various supermodels. For 2002, it was the Brazilian supermodel Gisele who, according to the website, is “clearly a fashion icon.” For 2004, it is Cindy Crawford who—again, according to the website—“embodies everything that Blackglama looks for in a legend.”¹

While I have heard of Cindy Crawford, I was pretty sure I had never heard of Gisele. As you might well imagine, this piqued my curiosity: How does someone or something get to be an “icon”? (I put aside for the moment the question of what it means to be “clearly” an icon. Can there be unclear or indistinct icons? Is a fuzzy icon anything like fuzzy math?). Icon is from the Greek *eikon*, which means image, picture, or representation.² In religious art, an icon is an artistic representation of something considered holy or divine.³ In art history, iconography or iconology is the study of the conventional meanings of the iconic representations used to convey some doctrine or traditional story—typically some saint portrayed in a cathedral window, but also in paintings by relatively more modern masters such as Vermeer.⁴ The term iconography is also used to refer to the archetypical scenes, characters, or images used in literary works such as novels or

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1. Information, including photos, on Blackglama’s advertising campaigns, both past and present, can be found online at <http://www.blackglama.com>.

2. VII THE OXFORD ENGLISH DICTIONARY 608-10 (2d ed. 1989) (hereinafter “OED”); THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 949 (2d ed. unabridged 1987) (hereinafter “RANDOM HOUSE”).

3. OED at 608, definition 2; RANDOM HOUSE at 949, definition 2.

4. OED at 610, definition 2; RANDOM HOUSE at 949, definition 2.

films.⁵

Now, you may be wondering what supermodels, religious symbols, and literary tropes have to do with the Supreme Court decision whose fiftieth anniversary we mark this year. Everything. If *Brown v. Board of Education*⁶ possesses the classic beauty and elegance of a Sophia Loren, then the constitutional analog of the tawdry sexuality of this year's girl Gisele is represented by such cases as *Bob Jones University v. United States*⁷ and *Batson v. Kentucky*⁸ in which the Court reaffirmed the preeminence of the rule against racial discrimination and in the very next breath made it all but impossible to enforce.

Bob Jones involved a private religious college that maintained a rule requiring the expulsion of any students who either dated "outside of their own race" or spoke in favor of interracial dating.⁹ The Court held that private schools which discriminate do not qualify as charitable organizations within the meaning of section 501(c) of the Internal Revenue Code and, thus, are not eligible for tax deductible charitable contributions under section 170(a) of the Code.¹⁰ The Court declared that:

Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education. An unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.¹¹

Although the Court's holding in *Bob Jones* sounds like a strong reaffirmation of *Brown* and a blow for racial equality, the truth is more

5. *Id.*

6. 347 U.S. 483 (1954).

7. 461 U.S. 574 (1983).

8. 476 U.S. 79 (1986).

9. *Bob Jones*, 461 U.S. at 581.

10. *Id.* at 595 ("Given the stress and anguish of the history of efforts to escape from the shackles of the 'separate but equal' doctrine . . . , it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, . . . should be encouraged by having all taxpayers share in their support by way of special tax status.").

11. *Id.* at 593.

complicated. For the very next year in *Allen v. Wright*,¹² the Court pulled all the teeth out of the *Bob Jones* ruling by holding that no one, in effect, had standing to challenge IRS policies that allowed tax deductible status for 501(c) organizations without making any meaningful inquiry into whether they were in fact discriminating.¹³

In *Batson*, the Court held that prosecutors could not exercise their peremptory challenges to strike potential jurors “solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.”¹⁴ The Court specifically overruled its prior decision in *Swain v. Alabama*,¹⁵ which had required defendants to show that prosecutors had used their peremptory challenges in a discriminatory manner “in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be.”¹⁶ Because this “crippling” burden of proof had virtually immunized prosecutors’ use of peremptory challenges,¹⁷ the *Batson* Court held that a defendant could make a prima facie case of purposeful discrimination in the exercise of peremptory challenges solely on the basis of the prosecutor’s actions in his or her case.¹⁸ Thus, a pattern of strikes exercised against African American potential jurors could give rise to an inference of discrimination. At that point, however:

[T]he burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement

12. 468 U.S. 737 (1984).

13. The Court held that even those who had suffered personal injury did not have standing because their injuries could not fairly be traced to the government’s conduct in failing to assess more effectively the actual policies of organizations claiming charitable status under §501(c). *Id.* at 757-61. Ironically, it was only the injunction issued by the D.C. Circuit in the pending case in *Allen* that saved *Bob Jones* from being mooted by the government’s change of position. *Bob Jones*, 461 U.S. at 585 n.9.

14. *Batson*, 476 U.S. at 89. *Batson* has since been extended to cases in involving white defendants, *Powers v. Ohio*, 499 U.S. 400 (1991), civil suits, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), use of peremptory challenges by defense counsel, *Georgia v. McCollum*, 505 U.S. 42 (1992), and peremptory strikes based on gender, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

15. 380 U.S. 202 (1965).

16. *Id.* at 223.

17. *Batson*, 476 U.S. at 92-93.

18. *Id.* at 95.

imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.¹⁹

The prosecutor, in other words, could defeat the inference of discriminatory intent merely by pointing to the potential juror's demeanor or her equivocal answer to a question—a rebuttal available in virtually any case.²⁰

If *Brown* is being celebrated this year at law schools and legal functions across the land, it is because it has long since been transformed from a productive precedent and robust rule of law to a revered relic and feel-good icon that affirms our essential goodness in the face of a social fabric that is racked by inequality and a greater gap between haves and have-nots than at any time in the last thirty years.²¹ If *Brown* is the preeminent moment of twentieth-century constitutional law, it has long since passed into the pantheon of constitutional archetypes that include *Marbury v. Madison*,²² *Dred Scott v. Sandford*,²³ *Lochner v. New York*,²⁴ *Wickard v. Filburn*,²⁵ and the “one person, one vote” ruling in the reapportionment cases, *Reynolds v. Sims*²⁶ and its predecessor, *Baker v. Carr*.²⁷ Just as one can

19. *Id.* at 97.

20. The Court subsequently defined “a neutral explanation” as any facially valid “explanation based on something other than the race of the juror.” *Hernandez v. New York*, 500 U.S. 352 (1991) (plurality opinion). See also *id.* at 375 (O'Connor, J., concurring) (*Batson* “does not require that the justification be unrelated to race. *Batson* requires only that the prosecutor's reason for striking a juror not be the juror's race.”) (emphasis in original). The explanation found acceptable in *Hernandez* was that the prosecutor, who had stricken all three of the potential jurors with Spanish surnames, was not certain that these bilingual jurors could put aside their own understanding of testimony offered in Spanish to accept the official translation of the court interpreter. *Id.* at 60–63.

21. See, e.g., David Leonhardt, *Time to Slay the Inequality Myth? Not So Fast*, *The New York Times*, Jan. 25, 2004, sec. 3, p.4, col. 1 (“the rich have done far better than others over the past 20 years—as well as over the past 30, 40 or 50 years, according to government statistics and the economists who study them.”).

22. 5 U.S. (1 Cranch) 137 (1803).

23. 60 U.S. (19 How.) 393 (1857).

24. 198 U.S. 45 (1905).

25. 317 U.S. 111 (1942).

26. 377 U.S. 533 (1964).

27. 369 U.S. 186 (1962) (holding that challenge to state reapportionment did not present a nonjusticiable political question).

most harshly condemn a constitutional decision by comparing it to *Lochner*,²⁸ one can gain moral and legal purchase for a constitutional argument by tying it in some way (however tenuous) to the decision in *Brown*.²⁹

Brown's iconic status resides in the fact that it is imbued with cultural meaning even as it has steadily been emptied of both legal meaning and practical effect. Those familiar with my work know that socio-cultural phenomena like this catch my interest.³⁰ And, so, I asked myself: When, exactly, did *Brown* become an icon? Perhaps it was in the mid-nineties when the Supreme Court effectively drew to a close the era of school desegregation with its decisions in *Oklahoma City Public Schools v. Dowell*,³¹ affirming a ruling that the Oklahoma City schools had made sufficient progress to be declared unitary; *Freeman v. Pitts*,³² further accelerating the time at which a federal district court could relinquish supervision of a desegregation case; and *Missouri v. Jenkins*,³³ limiting the district court's authority to impose remedies for harms resulting from segregation. Perhaps it was in the mid-seventies when the Supreme Court drew the line against the expansion of the principle of equality in decisions such as *San Antonio School District v. Rodriguez*,³⁴ rejecting school equalization; *Milliken v. Bradley*,³⁵ rejecting interdistrict busing; and *Washington v. Davis*,³⁶ requiring proof of intent in order to make a case of racial discrimination. Or perhaps it was already in 1955 when in *Brown II* the Court decided that desegregation could proceed "with all deliberate

28. See, e.g., Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 937-43 (1973) ("I do wish 'Wolf!' hadn't been cried so often But at least crying 'Wolf!' doesn't influence the wolves; crying 'Lochner!' may.").

29. See discussion *infra* text accompanying nn. 63-88.

30. See, e.g., Steven L. Winter, *When Self-Governance Is a Game*, 67 BROOKLYN L. REV. 1171 (2002) (discussing the effectiveness and social provenance of the "game" rhetoric used by the Republican Party and its supporters during the period following the November 2000 presidential election).

31. 498 U.S. 237 (1991).

32. 503 U.S. 467 (1992).

33. 515 U.S. 70 (1995).

34. 411 U.S. 1 (1973).

35. 418 U.S. 717 (1974).

36. 426 U.S. 229 (1976).

speed."³⁷

But, surely, this is both too early and too despondent. While *Brown II* certainly set the tone for *Brown's* later undoing, it was explicitly supplanted in 1968 in *Green v. County School Board*,³⁸ when, on behalf of the Court, Justice Brennan insisted that local school boards in the South come up "with a plan that promises realistically to work, and promises realistically to work now."³⁹ Three years later, in *Swann v. Charlotte-Mecklenburg*,⁴⁰ the Court upheld the first busing order and, in *Keyes v. Denver School District* in 1973,⁴¹ the first Northern school case which also resulted in court-ordered busing to achieve desegregation. Clearly, 1973—when *Keyes* and *Rodriguez* were both decided—was the watershed year. But it would be another twenty years before the bell would toll for court-ordered desegregation and, thus, for the legal import of *Brown*.

It was, rather, in the mid-eighties that *Brown* became an icon. It happened not, I think, in a judicial decision, but rather in the Senate Judiciary Committee hearing room when Robert Bork testified that *Brown v. Board of Education* was "surely correct," and was one of "the Court's most splendid vindications of human freedom."⁴² Bork, as you may recall, had been a staunch critic of the Warren Court.⁴³ He had nonetheless undergone a "confirmation conversion"⁴⁴ with respect to some of those decisions, most

37. *Brown v. Board of Educ. of Topeka*, 349 U.S. 294, 301 (1954).

38. 391 U.S. 430 (1968).

39. *Id.* at 439 (emphasis in original).

40. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

41. *Keyes v. School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973).

42. Stuart Taylor, Jr., *The Bork Hearings; Bork Backs Away from His Stances on Rights Issues*, *The New York Times*, Sept. 17, 1987, sec. A, p. 1, col. 6.

43. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L. J.* 1 (1971).

44. See, e.g., Linda Greenhouse, *The Bork Hearings; Senators Question the Sincerity of Bork's New Views*, *The New York Times*, Sept. 18, 1987, sec. A, p. 22, col. 1 ("Both Senator Arlen Specter of Pennsylvania and Senator Patrick J. Leahy of Vermont, in questioning Judge Bork on his views of the First Amendment's free speech guarantee, raised the question of whether his current opinions were part of a 'confirmation conversion.'"); Stuart Taylor, Jr., *How Bork Recast Ideas In His Senate Testimony*, *The New York Times*, Sept. 21, 1987, sec. B, p. 14, col. 1 ("One of the most remarkable aspects of Judge Robert H. Bork's five days of testimony last week was his recantation and qualification of some controversial views he has stated, forcefully and repeatedly, in the past He even softened somewhat his thunderous attacks on Supreme Court decisions recognizing rights to abortion and sexual privacy and other rights not specifically enumerated in the

particularly *Griswold v. Connecticut*⁴⁵ recognizing the constitutional right of married couples to use contraception. Prior to that point, however, *Brown* was virtually the only civil rights and civil liberties decision he had *not* opposed. Although he stressed in the committee hearing his “reverence” for *Brown*, he simultaneously questioned the companion decision in *Bolling v. Sharp*.⁴⁶ Bork testified that he had not thought of a rationale that would support the Supreme Court’s decision to desegregate schools in the District of Columbia, which, as part of the Federal Government, is not subject to the Equal Protection Clause.⁴⁷ In much the same vein, he criticized Justice Powell’s opinion in *Bakke*⁴⁸ supporting limited affirmative action for the purpose of achieving diversity.⁴⁹ In other words, even prior to his confirmation conversion, an outspoken conservative such as Robert Bork understood that no one who was not prepared to pay obeisance to *Brown* could possibly be confirmed to the Supreme Court.

This caused a slight problem for Associate Justice Rehnquist who was shortly to be elevated to Chief. As a young man, Rehnquist clerked for Supreme Court Justice Robert Jackson when the *Brown* cases were first being considered. As a law clerk in 1952, he wrote a memorandum to the Justice arguing that *Plessy v. Ferguson*⁵⁰ and its “separate but equal” rule should be affirmed. When questioned about that memorandum during his first confirmation hearing in 1971, he claimed that it had been prepared for Jackson’s use at the upcoming conference of the Justices and that the views it expressed were Jackson’s and not his own.⁵¹ Richard Klugler subsequently debunked that claim in a long footnote in *Simple Justice*,⁵² his

Constitution.”).

45. 381 U.S. 479 (1965).

46. 347 U.S. 497 (1954).

47. Taylor, *supra* note 42.

48. *University of California v. Bakke*, 438 U.S. 265, 269 (1978).

49. See Lloyd N. Cutler, *Saving Bork From Both Friends and Enemies*, *The New York Times*, July 16, 1987, sec. A, p. 27, Col. 1.

50. 163 U.S. 537 (1896).

51. RICHARD KLUGLER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 605 (1975).

52. KLUGLER, *supra* note 51, at 767-71 n.*. See also Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson and the Brown Case*, 1988 SUP. CT. REV. 245, 250 (“Jackson never expressed the view attributed to him by Rehnquist On the contrary, from the beginning of the *Brown* decision process, Jackson indicated that he would support a properly written decision striking down segregation.”); John A. Jenkins, *The Partisan*, *The*

widely acclaimed history of *Brown* and its companion cases. Amongst the evidence inconsistent with that claim is a line in the memorandum disparaging the Court's decisions protecting the First Amendment rights of Jehovah's Witnesses—a line of cases that includes Jackson's eloquent 1943 decision in the second flag salute case⁵³—and the testimony of Justice Jackson's secretary, who rejected as “incredible” the suggestion that Jackson would ever have asked a law clerk to prepare his remarks for conference discussions.⁵⁴ Indeed, a subsequent search of Jackson's Supreme Court papers by Dennis J. Hutchinson of the University of Chicago Law School—“every box, every detail”—revealed no other instance in which the Justice had asked a law clerk to prepare such a memorandum prior to the conference.⁵⁵

What the search did reveal, however, was another memorandum that Rehnquist had written as a law clerk. In *Terry v. Adams*,⁵⁶ the Court looked through form to substance and held that a whites-only, private political club that effectively determined the candidates in Democratic primaries and other countywide elections violated the Fifteenth Amendment. In his memorandum, Rehnquist advised Justice Jackson:

The Constitution does not prevent the majority from banding together, nor does it attain success in the effort. It is about time the Court faced the fact that the white people in the South don't like the colored people; the Constitution restrains them from effecting this dislike through state action, but it most assuredly did not appoint the Court as a sociological watchdog to rear up every time private discrimination raises its admittedly ugly head. To the extent that this decision advances the frontier of state action and “social gain,” it pushes back the frontier of freedom of association and majority rule.⁵⁷

Jackson, of course, shared no such sentiments. He joined Justice Clark's

New York Times, March 3, 1985, sec. 6, p. 28, col. 1.

53. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). See text accompanying notes 80-81 *infra*.

54. KLUGER, *supra* note 51, at 768 n.*.

55. Jenkins, *The Partisan*, *supra* note 52.

56. 345 U.S. 461 (1953).

57. Jenkins, *The Partisan*, *supra* note 52.

concurring opinion.⁵⁸ Though the Court was split with respect to the rationale, only Justice Minton dissented.⁵⁹

By the time of his confirmation as Chief Justice, Rehnquist had accepted *Brown* as the law of the land, though he continued to insist that “there was a perfectly reasonable argument the other way.”⁶⁰ At those confirmation hearings, he was questioned vigorously by Senator Biden concerning his views at the time of his clerkship for Justice Jackson. Rehnquist managed to side-step the question without answering it.⁶¹

One of the tough things about being an icon—and this is, I think, as true for *Brown* as it is for those gold-painted little wooden statues with the faces of saints on them—is that, while an icon has powerful meaning, the meaning it has is principally a projection and reflection of the believer. The meaning of an icon is read into it. And that is exactly what has happened to *Brown*: Judges and scholars have read into *Brown* all sorts of meanings that do not particularly jibe with the elegance, the beauty, the moral force of Chief Justice Warren’s plain spoken opinion. Some of these have been limiting meanings, as in the cases noted earlier and some others.⁶² Some have been meanings that might be characterized as more extensive or, even, abstruse.

In a 1990 article entitled “If He Hollers Let Him Go: Regulating Racist Speech on Campus,”⁶³ Charles Lawrence argued that *Brown* serves as a precedent supporting campus hate speech codes.

58. *Terry*, 345 U.S. at 477.

59. *Id.* at 484.

60. Jenkins, *The Partisan*, *supra* note 52. On the memorandum discovered by Professor Hutchinson, Rehnquist demurred: “Whatever I wrote for Justice Jackson was obviously a long time ago, and to kind of integrate it into something I’m telling you now, I find rather difficult.” *Id.*

61. Linda Greenhouse, *Rare Grilling for a Justice of High Court*, *The New York Times*, July 31, 1986, sec. A, p. 14, col. 1 (“‘Senator, I don’t think I reached a conclusion,’ he said. ‘Law clerks don’t have to vote.’ ‘Yes, but they surely think,’ Senator Biden said. ‘Yes, they do,’ was the reply. A moment of silence followed. ‘I’ll be darned,’ Senator Biden said.”).

62. *See, e.g.*, *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 524 (1989) (Scalia, J., concurring) (adopting the principle that government must be color-blind and noting the school cases as the exception where race conscious state action is permissible solely because it “is necessary to eliminate their own maintenance of a system of unlawful racial classification.”).

63. Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 *DUKE L. J.* 431 (1990).

Brown held that segregation is unconstitutional not simply because the physical separation of black and white children is bad or because resources were distributed unequally among black and white schools. *Brown* held that segregated schools were unconstitutional primarily because of the *message* segregation conveys.⁶⁴

The argument is a clever, creative one. Still, whatever one thinks about the constitutionality of hate speech codes on campus, it remains true that *Brown* is a case about what the *state* may do and say with respect to race and not a case about the regulation of individual speech on campus, in school, or elsewhere.⁶⁵ Here, we have an example of the rhetorical strategy to which I earlier referred in which one tries to gain moral and legal purchase for a constitutional argument by tying it to the *Brown* decision.

Lawrence's argument is, at least, close to home in the sense that it is an attempt to amplify *Brown's* central message of equal dignity and respect for all persons.⁶⁶ Bruce Ackerman, in contrast, has argued that *Brown* is not the "prophetic utterance" idealized by so many of its admirers as it is the product of the New Deal's affirmance of the activist, regulatory state and the impact of that development on the egalitarian vision of Reconstruction.⁶⁷ The fulcrum of this argument is a reading of *Plessy v. Ferguson*⁶⁸ as resting on two assumptions. First, *Plessy* drew a sharp distinction between political equality, which was protected by the Fourteenth Amendment, and social equality, which could not be enforced by the law.⁶⁹ This assumption, Ackerman points out, was undermined by the constitutional developments that attended the New Deal: "Once the New Deal Court had authorized the state's power to guarantee a retirement pension or a minimum wage, [*Plessy's*] confident distinction between political and social equality was no longer tenable."⁷⁰ Second, *Plessy* viewed the question of the meaning of segregation as "'solely' a product of private 'choices'; the state simply has

64. *Id.* at 439 (emphasis in original).

65. Lawrence, however, does address the critique of the public/private distinction that underlies the state action doctrine. *Id.* at 444-49.

66. *See id.* at 438 ("*Brown* can also be read more broadly to articulate a . . . principle of equal citizenship.").

67. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 140-50 (1991).

68. 163 U.S. 537 (1896).

69. *Id.* at 544.

70. ACKERMAN, *supra* note 67, at 146.

nothing to do with it."⁷¹ Thus, where *Plessy* had cruelly suggested that blacks had "chosen" to interpret Jim Crow as a statement of inferiority, the lesson of the New Deal—as Ackerman sees it reflected in *Brown*—was that this understanding was no longer tenable: "The New Deal Court recognized the government as an active contributor to the process by which groups made their 'choices' in American society."⁷²

The obvious problem with this argument is that *Brown* had little or nothing to say about the activist state and the role of the government in establishing meaning. Ackerman is aware of this difficulty. He responds: "What is a 'public school but a place where government employees 'educate' children into the 'truth' about social reality . . . ?"⁷³ For Ackerman, the import of the New Deal was that public schools "were no longer anomalous, but paradigmatic of the new promise of activist government."⁷⁴ On Ackerman's reading, Warren's discussion of the role of public education—its role as "the most important function of state and local government," "the very foundation of good citizenship," and "the principal instrument in awakening the child to cultural values"⁷⁵—is transformed into the use of the public school as a "compelling symbol of the modern republic's activist commitment to the general welfare."⁷⁶

Ackerman's account of *Brown* is, to say the least, forced. In fact, the only reference to the role of the state in the construction of meaning comes when Chief Justice Warren quotes the lower court finding that: "The impact [of segregation] is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group."⁷⁷ And, contrary to Ackerman's reading, this passage suggests only that the state contributes by magnifying an already existing psychological meaning.

71. *Id.* at 147 (discussing *Plessy*, 163 U.S. at 551).

72. *Id.* at 148.

73. *Id.*

74. *Id.*

75. *Brown*, 347 U.S. at 493.

76. ACKERMAN, *supra* note 67, at 149. In an earlier version of the argument, he observed: "Just as one might use the history of the White House as a trope to express the rise of the Presidency, Warren used the history of public education to express the rise of the activist welfare state in modern constitutional interpretation." Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 540 (1989).

77. *Brown*, 347 U.S. at 494 (quoting lower court finding not published in opinion below, *Brown v. Board of Educ.*, 98 F. Supp. 797 (D. Kan. 1951)).

Ackerman's reading, moreover, is premised on a claim that is far too strong for the historical record to bear. The public school was hardly the centerpiece of the New Deal; one is left to wonder at the claim that it "had become emblematic of the New Deal's activist use of state power for the general welfare."⁷⁸ Additionally, it is hard to square Ackerman's revisionist reading of *Brown* with the actual case law that followed the New Deal. Recall that, for Ackerman, the public school exemplifies the activist state because it is the institution authorized to induct children into its version of social reality.⁷⁹ But this was precisely the position rejected by Justice Jackson writing for the New Deal Court in the second flag-salute case, *West Virginia State Board of Education v. Barnette*.⁸⁰ "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."⁸¹ Indeed, as Justices Douglas and Black explained in their concurring opinion, the New Dealers on the Court had come to see that the power of the state could not be given the same leeway in matters of politics and belief as it was now allowed in matters of economic policy.⁸²

The worst thing about Ackerman's reading of *Brown*, however, is not that he misreads it but that he fails to do it justice. For Ackerman, Warren's opinion in *Brown* represents a "weak rhetorical performance."⁸³ But what speaks to so many of us is precisely the forthrightness and unvarnished elegance of Warren's prose:

• "[W]e cannot turn the clock back to 1868 when the Amendment

78. ACKERMAN, *supra* note 67, at 141.

79. *See supra* text accompanying note 76.

80. 319 U.S. 624 (1943).

81. *Id.* at 642. In fact, *Barnette* decisively rejected the Court's then-recent decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), the first compulsory flag-salute case. Justice Frankfurter's majority opinion in *Gobitis* had rested on the strong statist view that the government was free to employ this means to promote good citizenship, inculcate patriotism, and maintain national cohesion. *Gobitis*, 310 U.S. at 595-96.

82. Accounting for the change in their vote since *Gobitis*, they explained:

Reluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare was the controlling influence which moved us to consent to the *Gobitis* decision. Long reflection convinced us that although the principle is sound, its application in the particular case was wrong. *Barnette*, 319 U.S. at 643 (Black & Douglas, JJ., concurring).

83. ACKERMAN, *supra* note 67, at 142.

was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life⁸⁴

• “To separate them . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁸⁵

• “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”⁸⁶

Warren had no trouble explaining what was wrong about *Plessy*’s reasoning: It was not that the *Plessy* Court missed the state’s role in establishing meaning; it was that it failed honestly to acknowledge that in Jim Crow the state *was* speaking in socially and morally derogatory terms by enacting into law the prejudice of its white majority.⁸⁷ Segregation mandated by law was evil for the simple and obvious reason that “exclusion is a primary form of humiliation, and humiliation is crippling—it does terrible injury to people, it twists them, it deforms them, as every American minority can attest and as the best American minority writers make clear in their work.”⁸⁸

So, what becomes a legend most? We could take that question two ways. We could take it on the level—in which case the only answer that would be becoming would be to rededicate ourselves and our law to making real the promise of an egalitarian society that was first offered in the Declaration of Independence, made part of the Constitution with the adoption of the Fourteenth Amendment, and taken up in its generation by *Brown* and the civil rights movement of the 1950s and 1960s. But we have only to look at the city centers around us—not to mention our political rhetoric and electoral campaigns—to see how far we stand from that

84. *Brown*, 347 U.S. at 492.

85. *Id.* at 494.

86. *Id.* at 495.

87. Indeed, the *Plessy* Court admitted as much when it asserted that the legislature “is at liberty to act with reference to the established usages, customs and traditions of the people.” *Plessy*, 163 U.S. at 550.

88. Philip Roth, *The Story Behind “The Plot Against America,”* *The New York Times*, Sept. 19, 2004, sec. 7, p. 10. See also Charles Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421 (1960).

possibility. Or, we could take the question as ironic—in which case the honest answer is that what becomes a legend is precisely that which makes us feel virtuous, generous, attractive: *Brown* is revered as an icon not for what it is or what it accomplished, but rather as a beautiful picture at which we love to gaze and see reflected in it our better selves.

But I do not mean to suggest that all hope is lost. According to the Blackglama site “all legends share a timelessness, a glamour, an endurance that goes beyond what’s current or merely in vogue.”⁸⁹ *Brown* most certainly fits that standard. Even in our most skeptical moments, we know that *Brown* is a legend, a symbol, an emblem of truth and justice. If we mourn the degree to which *Brown* has become an icon, we must simultaneously celebrate it as a legend that—regardless of what transpires around us—continues to speak to us in plaintive tones that importune us, still, to rise to its challenge.

89. See *supra* note 1.